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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 455, 456.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD., *Respondent*.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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December 1947.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The Tax Court rendered an unreported memorandum opinion covering both cases which appears in the record at pages 103-109.[1] The opinion of the Circuit Court of Appeals (163 F. 2nd 531) also covered both cases and will be found in the record at pages 132-137.

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[1] References herein to the record refer to the record in No. 455 unless prefaced by the word "Jute, viz: (Jute, R. —).

JURISDICTION.

The judgment of the Circuit Court of Appeals in each case was entered August 25, 1947 (R. 138). The Petition for Writs of Certiorari was filed November 25, 1947, and served on counsel for respondent on December 4, 1947.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, in these cases, the Circuit Court of Appeals erred in holding that taxpayer, who operated as a non-profit cooperative marketing association under the laws of California *is not thereby prevented* from recovering a refund under Title VII of the Revenue Act of 1936 of the processing tax paid by it as a processor under the unconstitutional Agricultural Adjustment Act of 1933.

Petitioner's statement of the questions presented will be discussed in the argument.

STATUTES INVOLVED.

The question presented by these cases involves the construction and application of the statute known as Title VII of the Revenue Act of 1936 covering the making of refunds of processing taxes collected under the unconstitutional Agricultural Adjustment Act of 1933, as amended, (*U. S. v. Butler, et al.*, 297 U. S. 1), the pertinent parts of which are set forth as Appendix to the petition, pp. 27-35; and Chapter 4 of the California Agricultural Code, defining the character and covering the organization and operation of non-profit cooperative marketing associations, set forth as Appendix hereto (*infra*, pp. 27-39).

STATEMENT.

The only question so far considered in these cases is whether, solely because a processor operated as a non-profit cooperative marketing association, that is, not for

its own profit nor for the profit of its members or stockholders as such but for the benefit of its members as producers, returning to them the entire proceeds of its operations less expenses based on the quantity and quality of the product supplied, a processor is barred from recovering a refund under Title VII of the Revenue Act of 1936 of any of the processing tax paid by it, notwithstanding the jointly verified margin evidence prescribed by said Title VII shows prima facie that said processor bore the burden of $2,127,935.76 of said tax (R. 87-89).

The decisions of the Courts below on this question were brought about by the Commissioner's identical motions in the Tax Court to dismiss the petitions therein without filing answers thereto (R. 101-102, and Jute R. 29-30). In such situation the facts alleged in the petitions to the Tax Court are the only facts of the case and must be taken as true. To avoid duplication reference is made to said petitions (R. 3-17, and Jute R. 3-13) for the statement of facts. The statement by petitioner herein is not based on the record facts, but upon a biased statement of conclusions found in the opinion of the Tax Court.

The grounds of said motions to dismiss were summarized by the Tax Court as follows:

That said petitions and their attached exhibits (1) failed to set forth a cause of action for refund of any part of the processing tax; (2) show that petitioner bore none of the burden of the tax; and (3) failed to show that the petitioner's contractual rights or benefits with its stockholder-members were adversely affected by the payment of the tax.

On this summary statement of the grounds for said motions, the Tax Court dismissed the petitions in both cases, holding that taxpayer shifted the burden of the processing tax "through reduction of the price paid for any such commodity" (R. 106). Such holding ignores the meaning of the clause quoted from the statute, that is, that "such commodity" referred to the "commodity with respect to which a tax was imposed". That the Tax Court so ignored the

correct meaning of the clause quoted is evident from the facts that (1) the jute on the processing of which the tax was paid was not acquired from taxpayer's members but from strangers in the open market (Jute R. 12, ¶ 16), and (2) that of the total raw sugar acquired by taxpayer from its members during the two accounting years in which the tax period fell, to wit, 1,663,470 short tons, only 784,554 short tons or about 47 percent was a "commodity with respect to which a tax was imposed" (R. 10-11, ¶ 13). Therefore, even on the theory that a cooperative pays only a "price" to its member-producers for their products, and that this "price" is the "price" referred to in the clause of the statute quoted, the Tax Court in totally dismissing the petitions on any such ground clearly erred.

The Tax Court's opinion gave no consideration whatever to the nature of a non-profit cooperative marketing association organized and operated under the laws of California and the legal relations between such cooperative and its members as producers.[2] Furthermore, the Tax Court's opinion and its decision based thereon gave no consideration whatever to the applicability of the margin evidence prescribed by Section 907 of Title VII which was intended to resolve the question posed by Section 902 of said Title.[3]

On appeal of the cases to the Circuit Court of Appeals that Court ordered that the decisions of the Tax Court dismissing the petitions be set aside and remanded the cases to the Tax Court for further consideration. In its opinion the Circuit Court of Appeals held that the cooperative marketing contract in these cases (1) was not one of ordinary purchase and sale; (2) under California law the relationship created was one of trustee and beneficiary, and (3) that the provision for the deduction of expenses in the trust instrument is not the "reduction of

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[2] C. C. A. Op. R. 133.

[3] Helvering v. Insular Sugar Refining Corporation, 141 F. (2d) 713, 717.

the price paid for any such commodity" as provided in Section 902, but an expense of the trust administration. The Court then said:

> " * * * It can no more be said that the trustee transfers the burden of his tax in the reduced amount distributed to his beneficiaries, than does the corporation in a distribution of net earnings after deducting such tax, transfer its burden to the stockholders who created it."

In the Circuit Court of Appeals the Commissioner urged for the first time as another ground for his motion to dismiss the petition in No. 456 that the claim for refund of the processing tax paid on jute fabric manufactured into bags (Jute R. 14-26) was insufficient in that the margin schedules (Jute R. 16-17) were not filled in. It should be noted that although said margin schedules are not filled in, the Jute claim has attached to it a complete statement of the evidence in support of the claim (Jute R. 21-26). It is explained therein that the reason for failure to fill in the margin schedule was that the jute bags were not sold and for that reason had no "sales value", a necessary component part of the margin computation. The Circuit Court of Appeals did not pass on this contention of the Commissioner, but stated that "his contention raises a justiciable question", and because the Tax Court's decision did not require a consideration of this contention returned the case to the Tax Court for further consideration.

ARGUMENT.

The cases do not warrant further review of any question of law presently involved therein. This Court has laboriously reviewed three cases involving the application and administration of Title VII of the Revenue Act of 1936, the only federal statute involved, (1) *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, involving the constitutionality of the statute as an alleged infringement of due process of law, (2) *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164, dealing

with the presumption, its rebuttal and the function of the margin evidence prescribed by section 907 of said statute, and (3) *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, involving the procedural requirements of a claim for refund under said statute. Petitioner has pointed to no probable conflict between the decision of the Circuit Court of Appeals below and these or any other applicable decisions of this Court.

These decisions thus covering practically all angles within the scope of Title VII of the Revenue Act of 1936, together with the many Circuit Courts of Appeal decisions, in a considerable number and variety of which petitions for writs of certiorari have been denied by this Court, ought to furnish an ample guide for the lower courts in the few cases remaining for decision under this Title.

Because of the many administrative refunds made and court decisions involving refunds, to corporations, partnerships, receivers and trustees, under Title VII of the Revenue Act of 1936, without raising the question, it seems now too late for the Commissioner to ask this Court to again review Title VII and hold for the first time that solely because a corporation has stockholders or member-producers, and a partnership has members, and a receiver or trustee has beneficiaries, who are by reason of these relationships the ultimate bearers of all burdens of their respective tax-paying entities, and by reason thereof a shifting of the burden of the tax occurs "in any manner whatsoever", and thus in effect hold that Title VII of the Revenue Act of 1936 is after all unconstitutional as being a denial of due process of law, notwithstanding the decision of this Court in *Anniston Mfg. Co.* v. *Davis* (*supra*). Yet such would be the practical effect of the review requested if it should result in a reversal of the decision of the Circuit Court of Appeals on the question now involved in these cases.

It is worthy of note at this point that this Court in *Annis-*

ton Mfg. Co. v. *Davis* (*supra*), first quoting from its earlier decision in *U. S.* v. *Jefferson Electric Mfg. Co.*, 291 U. S 386, said (l.c. 350):

> "The opposing contention was found to be particularly faulty in that it overlooked the fact that the statutes providing for refunds proceed on the same equitable principles that underlie an action in assumpsit for money had and received."[4]

And again on page 351 said:

> "Despite the broad language of section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it."

Analysis of Petitioner's reasons for granting the writs and a consideration of his statement of the questions presented, and his specification or errors to be urged show that the petition is not well founded.

At the outset these cases *do not involve "approximately $8,000,000 in claims against the United States"*. The amount prayed for in the Petition to the Tax Court in No. 455 is "at least $2,654,637.97", (R. 16) and in No. 456 is $4,818.00 (Jute R. 13). The phrase "at least" was inserted against the remote contingency that if the Commissioner pleaded evidence to rebut the presumption based on the prima facie evidence and rebuttal set forth in the petition, petitioner might present evidence in surrebuttal to justify a finding of a larger amount. Just why the petitioner here should seek to mislead the Court by exaggerating the amount involved is not clear.

Wherein the Circuit Court of Appeals below "has so far departed from the accepted and usual course of judicial

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[4] Imagine a claim being made that a corporation, a partnership (if entitled as here to sue as a person), a trustee or other fiduciary, or a cooperative, for that matter, could not maintain an action in assumpsit on the ground that their respective stockholders, members, beneficiaries or member-producers were the real sufferers.

proceedings as to call for an exercise of this Court's power of supervision" is nowhere pointed out by petitioner. It is a very serious charge and implies some arbitrary or irregular action by the court below, calling for exemplary correction by this Court. Counsel for respondent throughout the proceedings knows of no departure from the usual and accepted course in such proceedings below. Not supported by any specification of errors to be urged (unless perhaps it be the first, which will be considered hereafter) nor by any reference to the record, which appears to be regular in all respects, the charge should be ignored.

The decision of the Circuit Court of Appeals below does not conflict in principle or otherwise with any decisions of this Court nor with the decisions of other Circuit Courts of Appeal, as will be shown by the analysis below of the decisions cited.

The decision below, namely: that taxpayer, a processor who operated on a cooperative basis, is not thereby barred from showing like any other processor that it bore the burden of the tax in the amount claimed, presents no questions of importance in administration of the tax laws, except in the cases of this taxpayer. These are processing tax cases. The Petitions to the Tax Court therein were given Docket Nos. P. T. 452 and P. T. 453, and although filed on August 10, 1945 (R. 1) were the last two such cases to be filed to date. The question raised by the Commissioner in these cases as to whether a non-profit cooperative can bear any burden has never been raised before and probably will never be raised again.[5] The decision therefore has no precedent value whatever. The petition herein is silent on *what* questions of importance in the administration of the tax laws are affected by the decision below. For these reasons the petition ought to be denied.

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[5] It is informally understood and can be proven under allegation 19 (R. 12-13) that the claims of the beet sugar processors, some of whom operate as cooperatives, were settled by the Commissioner before any such question was raised in these cases.

From what has been said above as to petitioner's stated reasons for granting the writs, his arguments on the questions presented and errors specified should be carefully scrutinized.

Based on his first question and his first specification of error petitioner makes much ado about the sentence appearing in the early part of the opinion of the Circuit Court of Appeals below (R. 132-133) as follows:

> "* * * If, however, the processor has not had the burden of the tax or has transferred it to another person or persons, the right to sue the sovereign is given to the persons upon whom the burden was actually inflicted."

If one attributes to the statement the meaning that anyone who bore the burden of the tax has the right to sue the sovereign whether he was the taxpayer or not, then the statement is clearly in error, but is totally immaterial to the decision in these cases. If, on the other hand, the statement was made by way of affirming the non-existence of the right in a processor who paid the tax if he "has not had the burden of the tax or has transferred it to another" then it should not be so severely criticized, especially since it is pure dicta and has no application whatever to the facts of these cases. This respondent was liable for, and is the payor of the tax, is the claimant for refund thereof, and is the petitioner in the courts below. In this same paragraph of the opinion the Circuit Court below shows that it understood clearly the requirement that a processor who paid the tax must show that he is the one who in legal contemplation bore the burden of the tax.

It is not altogether unusual for courts to make such sometimes erroneous observations in an obiter dicta way.

Another instance of this is found in another processing tax case along almost exactly similar lines (*Helvering* v. *Insular Sugar Refining Corporation*, 141 F (2d) 713, l.c. 717, U. S. Court of Appeals, D. C.), where the court said:

> "* * * so that we have a case in which the Government illegally collected from claimant over $500,000 which in

> law and conscience it was obligated to repay to it, *or to whoever had borne the burden of the payment.*" [Emphasis supplied]

No petition for a writ of certiorari was filed in that case.

The error here complained of was immaterial and therefore not reversible error and furnishes no reason for granting the writs.

Respondent finds no quarrel with the holding of the many cases cited by petitioner on this point. but urges that they are in nowise in conflict with any material element of the *decision* of the Circuit Court below in the cases at bar. The cited cases on this point need not therefore be further examined in this connection.

The second point made by petitioner encompasses his statement of questions 2, 3, 4 and 5 and his specification of errors to be urged under the same numbers. Since this point and the questions and alleged errors encompassed therein are the very crux of these cases, it seems excusable that respondent may here deal with the merits of its case lest the Court be misled by petitioner's mere assertion of errors.

The point made is (Pet. p. 17):

> Holding that under California law the relationship created by taxpayer's contracts with its member-producers was that of a trust, with the members as settlors creating a trust estate for themselves as beneficiaries, the court below ruled that the Tax Court erred in deciding that the cooperative was relieved of the burden of the processing tax by virtue of its contract with its members.

Petitioner says this construction of the relationship "seems to us manifestly incorrect" and cites only the following excerpt from the Tax Court's Opinion (Pet. p. 18):

> The fact that the equitable owners of the stock and the producers are the same corporate individuals does not obliterate the important fact that these corporate individuals as producers occupy a different relation-

> ship to petitioner than that occupied in their capacity as stockholders. The processing taxes involved have been shifted by petitioner to its stockholder-producers in their capacity as producers and not in their capacity as stockholders. The burden was assumed by the producers, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the taxable commodity furnished (in the case of raw sugar), or used (in the case of jute bags); but in proportion to the raw sugar sold by the producer to the petitioner regardless of what amount of that raw sugar was ever actually processed or actually sold in bags or in bulk.

This expression of the Tax Court bears analysis. It furnishes no "reason" in support of the decision of the Tax Court except in those phrases used, such as "The processing taxes involved have been shifted by petitioner" * * * and "The burden was assumed by the producers" * * * which beg the question. On the other hand the substance of the statement that taxpayer's members as producers occupy a different relationship to taxpayer than that occupied in their capacity as stockholders; and that they as producers and not as stockholders are entitled to the proceeds of taxpayer's operations, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the *taxable* commodity furnished, but in proportion to the total products supplied by them, whether it was taxable or not, seems to recognize the true cooperative arrangement.

Somehow the cited expression by the Tax Court was calculated to support its decision, but actually it refutes factually and otherwise the Tax Court's primary holding that taxpayer shifted the burden of the tax "though reduction of the price paid" for the commodity subject to the tax (R. 106). It is noteworthy that the Tax Court nowhere held that in this cooperative arrangement there was a shifting "in any manner whatsoever" because it recognized that to have so held would conflict with all the cases making refunds to corporations, partnerships and trusts. (R. 106)

It is evident throughout the opinion of the Tax Court and the arguments of petitioner herein that their position stems from a total incomprehension of the elements of the cooperative arrangement as a form of business organization, or, worse on this record, from their failure to recognize that taxpayer is a cooperative.[6]

Taxpayer has never claimed that it is entitled to any special treatment under Title VII of the Revenue Act of 1936, but has always claimed that it is entitled to the same treatment accorded other processors under said title, that is, the right to show by the margin evidence prescribed by said Title that it bore the burden of the amount claimed. On the other hand the Commissioner claimed and the Tax Court below agreed that taxpayer was barred from showing that it bore any of the burden of the tax solely by reason of its cooperative method of doing business and the terms of the cooperative marketing contract.

Their error lies in the attempted treatment of the cooperative marketing contract (R. 27-72) as something apart from the whole cooperative arrangement as a form of doing business, whereas, actually such contract within the scope of the enabling laws fixes the legal relationships that persist throughout the cooperative form of doing business. Thus they seek to treat the "total payment" provided in the contract as exclusively the "price paid" for the products delivered thereunder, whereas, said "total payment" represents both a "price" for the products and a share of the profits or savings of the whole enterprise based on the quantity of products delivered by each member-producer. Thus also they seek to treat each transaction under the cooperative marketing agreement as a closed matter, as if

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[6] In its claim for refund taxpayer stated that it is a cooperative (R. 27) and attached thereto its cooperative marketing agreement (R. 27-72). In its petitions to the Tax Court taxpayer alleges that it was organized and operated on a cooperative basis throughout the periods involved, and was created under the laws of California (R. 8). Certainly the California laws under which taxpayer so operated would be admissible in evidence under such allegations.

between strangers, whereas, there is a continuing legal relationship formed thereby in which the products of all members are pooled into a business of processing, handling and marketing through the cooperative for the profit or loss of such members divisible on the basis of the products supplied.

Respondent has contended throughout the proceedings below that the relationship between it and its members as producers, without definitive legal characterization, was not unlike that existing between the ordinary corporation and its common stockholders, between a partnership and its members or between a trustee and his income beneficiaries. Each said type of organization, if a processor, was subject to the processing tax, and each would charge the tax into its operating or profit and loss account if it did not specifically pass such tax on to its vendees. The amount of the profit or loss after all deductions belongs in the equitable and economic sense to the common stockholders of the ordinary corporation, to the members of the partnership, to the income beneficiaries of the trust, and in the same way to the members as producers in a cooperative.[7] The fact

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[7] *U. S.* v. *Rock Royal Coop.*, 307 U. S. 533, 564, in which the court said:

> "The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.
>
> "The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of

that the amount of this profit or loss is reduced by reason of the inability of the processor organization to pass it on does not mean that there is any final shifting of the tax by the processor to those beneficially interested in or entitled to the profits thus reduced. This is so because under their or their successors' continuing relation to the processor based on their form of doing business any refund of the tax will redound to their benefit. Petitioner seeks to differentiate respondent's relationship with its producer-

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the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reactions would parallel those of stockholders of losing businesses. Neither the Act nor the Order protects anyone from lawful competition, nor is it essential that they should do so. We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price."

In *Paladini* v. *Flink*, 26 F. (2d) 21 (CCA-9), 279 U. S. 59, which was a case involving double liability of stockholders under California law in relation to a Federal law exempting ship owners from such double liability, the Circuit Court said, l. c. p. 23:

"• • • True, the protection of the limitation statute extends only to ship 'owners,' and, technically speaking, stockholders are not owners; but, in a broad popular sense, and for certain purposes in a legal sense, they are sometimes so regarded. 'While a corporation holds the legal title to, and the right to manage, control, and convey, its property, it holds the property for its stockholders, who are the equitable and beneficial owners. . . .' Lynch v. Turrish (C. C. A.), 236 F. 653; Id., 247 U. S. 221, 38 S. Ct. 537."

In the same case when reviewed by this Court in affirming the decision below in an opinion by Mr. Justice Holmes, said:

"• • • The purpose of the act of Congress was 'to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise.' (citing cases.) For this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. In common speech the stockholders

members from other relationships paralleled because respondent dealt with its member-producers in the purchase of raw sugar. Respondent did not deal with its member producers in the purchase of the Jute (Jute R. 12 ¶ 16), yet the same position is taken with respect to that claim.

Compared with the ordinary corporation-stockholder relationship there is lacking in the cooperative-producer relationship only the element that in the former a board of directors must act to distribute earnings which are reduced

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would be called owners, recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship."

In *Schuster* v. *Ohio Farmers' Co-Op. Milk Assn.*, 61 F. (2d) 337 (CCA-6); where the question was whether a non-profit cooperative marketing association should be treated like any other "moneyed" corporation under the bankruptcy laws, the Court said:

"* * * Obviously, the co-operative marketing association is organized for profit in the sense of financial benefit to its members. The element of departure from ordinary corporate economic practice is found in the fact that the financial gain is enjoyed by the members in proportion to the production, by each, of the products handled, rather than in proportion to the capital otherwise contributed by each to the conduct of the business; but this difference of economic principle governing the distribution of wealth cannot alter the fact that the sole incentive to membership in such an association is the nnancial benefit to be derived therefrom in the marketing of the farm products which the member is producing. There is nothing broadly eleemosynary in cooperative associations. They simply represent a banding together of producers for their common good, and the motive of each is pecuniary gain."

In *W. F. Boardman Co.* v. *Petch*, 199 Pac. 1047, 186 Cal. 476, the California Supreme Court said:

"A corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation, the stockholders are the beneficial owners of the property held by the corporation."

In *Hobbs* v. *Tom Reed Co.*, 129 Pac. 781, 165 Cal. 497, which was cited in the Boardman case, the same court said:

"A corporation is the agent and trustee of its stockholders, in their behalf and for their use and benefit, holding, controlling and managing the corporate property and business."

by any burden, whereas in the latter the distribution is by contract.

Compared with the partnership-partner relationship there is lacking in the cooperative-producer relationship only the element of the mutual agency of the partners which permits each partner to act for and bind the other partners, whereas in the cooperative-producer relationship the cooperative is in the nature of a common agent of its producers lacking only the element of control by the principals severally.

Compared with the trustee-beneficiary relationship there is lacking in the cooperative-producer relationship none of the required elements. The only difference is, and this is immaterial, that the parties themselves do not call the arrangement a "trust" but merely a "cooperative".[8]

Are any of the lacking elements material to the question here, said question being whether there is in any of the relationships a final shifting of the burden of the tax, when because of said burden the profits of each organization are reduced? We think not.

The trustee-beneficiary relationship as paralleled with the cooperative arrangement here proceeds upon the theory:

> (1) That respondent's members as producers severally transfer to respondent title to raw sugar, not for a "price" in the ordinary sense, but for a proportionate participation in the proceeds, not of the sugar each transfers, but of all the sugar all the members thus transfer, as well as in the proceeds of all other operations of the transferee;
>
> (2) That each producer-member by such transfers thus becomes a settlor of the trust and based on the

[8] An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is; it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust. (Sec. 2.8, 1 Scott on Trusts 37)

quantity of the property thus transferred as compared with all the property so transferred by other members fixes his percentage as a beneficiary of the trust;

(3) That by organizing as a non-profit cooperative marketing association under the laws of California which entails the equitable duty of operating exclusively for the benefit of the members in their capacity as producers only[9] and entering into the cooperative marketing contract which involved accounting for the entire proceeds of its operation, respondent and its members have manifested the intention to create a fiduciary relationship;[10]

(4) That this fiduciary relationship is with respect to property, namely, the raw sugar thus transferred;

(5) That respondent was the holder of title to the property under the equitable duty to deal with it for the benefit of, and account to, all its producer-members as beneficiaries; and

(6) That the provisions of the cooperative marketing agreement are the terms of the trust.

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[9] California Agricultural Code, Sec. 1192. Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

Sec. 1200 (i). The amount of any dividends which may be declared on the stock or members' capital, which dividends shall not exceed eight (8) percent per annum and which dividends shall be in the nature of interest and shall not affect the non-profit character of any association organized hereunder.

[10] The relationship between a cooperative association and its members as producers is a fiduciary relationship. (Legal Phases of Cooperative Associations by L. S. Hulbert, Bulletin 50, May 1942, Farm Credit Administration, Dept. of Agriculture, p. 5, citing among other cases *Bogardus* v. *Santa Ana Walnut Growers Association*, 41 C. A. 2nd 939; 108 Pac. 2d. 52, the case discussed and followed by the Circuit Court of Appeals below in its decision.)

Thus all the necessary elements of the trust relationship, settlors, property, trustee and beneficiary[11] are here present.

The Circuit Court of Appeals below embraced the trustee-beneficiary relationship as the one befitting taxpayer and its members as producers, and such is the primary basis of its decisions in these cases. The opinion on this point is well reasoned and sound in every respect and is based on a construction of local law in conformity with local decisions.

The Circuit Court of Appeals could have adopted one of the other parallels with equal soundness in so far as the question in these cases is concerned and have arrived at the same decision.

Petitioner does not contend that the construction of the local law is erroneous but argues, not very clearly, that such construction is somehow contrary to Treasury Regulations which he thinks should control the construed relationship.

In the first place it is well to note that the Treasury Regulations cited do not purport to define any legal relationship that may exist between persons; furthermore, that the processing tax was an excise tax imposed alike on all processors regardless of their classification as taxables for income taxation.

The first two regulations cited (Pet. p. 22), "classification of taxables" and "association distinguished from trust", show that they refer to classifications for income tax purposes and show nothing with respect to the alleged error of the Circuit Court of Appeals below. This is made even more clear by the *omitted* language of the second regulation just before the emphasized sentence. The omitted portion follows:

> "As distinguished from the ordinary trust described in the preceding paragraph there is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or

[11] Chapter 1, Sec. 3, Restatement of the Law of Trusts.

agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages."

Then follows the emphasized sentence:

> "*The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust.* * * *" [Italics supplied]

Petitioner would in this manner have the Court believe that the Regulation differentiates between a cooperative corporation such as respondent, and an ordinary trust, in such a way that the cooperative corporation could not stand in the position of trustee in any legal relationship. The Regulation read as a whole speaks for itself and has no such import.

The third Regulation cited (Pet. p. 23) was promulgated under Title VII and defines the term "person" for purposes of making a claim for refund of the processing tax. The purpose thereof is clearly to show that any type of "processor", whether a legal person or not, could be a "claimant", which is the term used in said Title.

The third point made by petitioner encompasses his question No. 6 and specification of error No. 6, and claims that if respondent's relationship with its members as producers is that of trustee and beneficiary, the claims here involved being filed by respondent in its name alone are insufficient to permit recovery, and that the decision of the Circuit Court of Appeals below to the contrary *seems* to conflict in principle with certain decisions (discussed hereinafter).

The record facts ought to resolve this contention and there is nothing even remotely suggesting a conflict in the decision thereof by the Circuit Court of Appeals below with the decisions cited, in principle or otherwise.

The processing tax imposed under the Agricultural Adjustment Act of 1933 purported to be an excise tax (*U. S.* v. *Butler,* et al, 297 U. S. 1). Said tax was imposed upon the act of the first domestic processing of certain commodities, without regard to the legal capacity in which said act was performed. Respondent having title to the raw sugar in its own name (R. 41) and being a first domestic processor thereof (R. 6, par. V (1)) said tax was imposed upon and paid by it in its own name.

The claim for refund of the processing tax so imposed and paid involved herein was filed by respondent under its own name (R. 17). In the "statement of facts and explanation" filed with said claim (R. 25-98) respondent stated specifically that it was "a so-called cooperative" (R. 27) and for that reason attached to the claim Schedule 3 (R. 73-78) containing the consent[12] etc. of its producer-members, and Schedule 3 (a) (R. 79) showing the percentage of interest of its members as producers "as a proper construction of the law may require" (R. 27). And of course there was also attached to the claim the cooperative marketing agreement (R. 27-72) which contains the terms of the "trust" as we have seen above. Certainly the laws controlling California non-profit cooperative marketing associations and all the provisions of the cooperative marketing agreement are part and parcel of the claim. No other construction is possible.

This brings us to a consideration of whether any conflict (in principle) with the cited cases is involved in the decision of the Circuit Court of Appeals below.

Angelus Milling Co. v. *Commissioner,* 325 U. S. 293. A succinct statement thereof is contained in the following statement by the court, l.c. 294, 295:

> "After United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914, invalidated the

[12] We now know but did not know then that respondent's member-producers, not having paid the tax, were not proper claimants in their own right. (See cases cited by petitioner under first point, pp. 11-17.)

processing tax, three claims were filed with the Commissioner on June 22, 1936, all stating the name of the taxpayer and claimant as 'Niagara Falls Milling Co. Inc., and/or Middleport Flour Mills, Inc.' Each of these claims is for only part of the period during which the tax was paid, and their total is $434,045.27. Admittedly the form of these claims did not satisfy the requirements of the statute or the authorized Treasury Regulations. They were filed on an old Form 843 and not on the required Form P. T. 79. While these claims were still undetermined, Niagara, on June 30, 1937, filed a claim in the sum of $436,231.73. This claim was in due form but was filed by Niagara on its own behalf alone. Thereafter, on August 15, 1938, petitioner filed a claim, designated 'Amendment to Claim', for itself alone for the refund of $145,839.12. While this claim was submitted on Form P. T. 79, it failed to give the information required by the form and the regulations, containing merely an apportionment between Angelus and Niagara of the three earlier claims. An attached affidavit stated that this claim 'was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc.' The Commissioner, on May 23, 1941, denied this claim."

The primary question in the case was whether any defect in the claim sued upon had been waived by the Commissioner. With respect thereto the court said, l.c. 295, 296:

"Petitioner's claim for recovering processing taxes paid by it was properly rejected by the Commissioner if it did not satisfy the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund. Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials. Tucker v. Alexander, 275 U. S. 228, 231, 232, 48 S. Ct. 45, 46, 72 L. Ed. 253; United States v. Memphis Cotton Oil Co., 288 U. S. 62, 71, 53 S. Ct. 278, 281, 77 L. Ed. 619; U. S. v. Garbutt Oil Co., 302 U. S. 528, 533, 58 S. Ct. 320, 323, 82 L. Ed. 405. Without needless elaboration, we conclude that there is nothing in what Congress has ex-

plicitly commanded to bar the claim. The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations. See United States v. Memphis Cotton Oil Co., supra, 288 U. S. at page 71, 53 S. Ct. at page 281, 77 L. Ed. 619; Commissioner of Internal Revenue v. Lane-Wells Co., 321 U. S. 219, 223, 224, 64 S. Ct. 511, 513, 88 L. Ed. 684. It is hardly contended that the confusing series of petitioner's claims which we have summarized, whether singly or in conjunction, obeyed the regulations. For such default the Commissioner could have rejected the claims out of hand. He did not do that, and by what he did do he has given rise to the contention that he waived the requirement of his regulations. The basis of this claim of waiver is that the Commissioner through his agents dispensed with the formal requirements of a claim by investigating its merits."

After thorough analysis the court holds there was no waiver of the requirements, and in that connection said

> * * * "The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission."

In the cases at bar there never has been any question of waiver, nor in fact, before the petition herein was filed, any question as to sufficiency of the claim in No. 455. And even yet the challenge to the sufficiency of this claim is conditioned on whether taxpayer is allowed any recovery on the theory that it was a fiduciary for the producer. We fail to see anything in the way of a conflict in principle or otherwise between the decision of this Court in the *Angelus* case and the holding of the Circuit Court of Appeals below that this claim is not insufficient on this ground. The only way the claim could possibly have been more complete in this respect is to have filed with it a legal brief spelling out the fiduciary character of the relationship. This was done dur-

ing the course of the administrative consideration of the claim but was not considered a part of the claim to be attached to the Petition to the Tax Court (R. 18-98).

Vica Co. v. *Commissioner,* 159 F. (2d) 148: Therein the claimant filed no margin evidence *and no other evidence* with its claim to support the burden placed on the claimant to show that it bore the burden of the tax. Since different evidence than that filed with the claim would not be admissible in support of the claim in the Tax Court it was proper to dismiss the petition, so the court held.

As applied to the claim in No. 455 the holding of this case has no bearing whatever. This claim (R. 18-98) has with it all the evidence necessary to a determination thereof in accordance with the statute including five margin computations, one filed on the original claim form (R. 21-22) showing tax borne to be $2,572,845.48, and four jointly verified alternate margin computations on four different bases, filed as amendments to the claim during the course of its consideration by the Commissioner and before the rejection of the claim (R. 83-98).

The Claim in No. 456 will be referred to in answer to petitioner's next point dealing specifically with that claim.

Lee Wilson & Co. v. *Commissioner,* 111 F. (2d) 313: No margin or other evidence that claimant bore the tax, only argument that law was unconstitutional.

Same case, 123 F. (2d) 232: Second claim. No margin evidence for base period because not in business and no attempt to show margin of comparable business permitted by statute (Sec. 907 (c)). Still claimed law unconstitutional.

Tennessee Consolidated Coal Co. v. *Commissioner,* 117 F. (2d) 452: No margin or other evidence to show tax burden borne because not available. Claimed only that law was unconstitutional.

Landrum v. *Commissioner,* 122 F. (2d) 857: No margin evidence filed with claim because not available—and no other evidence to support burden filed therewith.

Samara v. *United States*, 129 F. (2d) 594: The statute deals with merits of, rather than form of, claim. In his claim taxpayer only asserted he bore the tax but offered no evidence in support of the assertion. Court held evidence not submitted to Commissioner may not be admitted in court and decided case on its merits rather than on lack of jurisdiction.

Cherokee Textile Mills v. *Commissioner*, 160 F. (2d) 685: Evidence offered in Tax Court on a different ground than that stated in claim rejected and upheld. The case also involved a question of waiver by the Commissioner.

From this brief statement of what was decided in the cases cited by petitioner on this point it will be seen that there is no remote resemblance to a conflict between any of them and the decisions in the cases at bar.

In connection with this point petitioner also cites Treasury Regulations 96, Article 209, as indicating "that a claim by a fiduciary must disclose the claimant's fiduciary capacity" (Pet. pp. 24-25). In the first place, the regulation referred to makes no such requirement, in a case as here where the fiduciary both paid the tax and filed the claim for refund thereof. Furthermore, respondent fully disclosed its capacity in the claim filed. Here again some of the *omitted* language from the regulation quoted (Pet. p. 25) makes clearer what is there required of a claimant. It is as follows:

> "*In such cases if a refund is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon receipt of a specific request therefor.*" [Emphasis supplied]

Two other decisions by this Court are cited by petitioner with the assertion that the decision below is also contrary to them. *U. S.* v. *Andrews*, 302 U. S. 517, and *U. S.* v. *Garbutt Oil Co.*, 302 U. S. 528. Both of these cases deal with the sufficiency of income tax claims where original claims, admittedly ineffective, were amended with entirely new

matter after the statute of limitations for filing claims had expired. No fact or principle of those cases is involved in the case at bar.

The fourth and last point made by petitioner encompasses his question No. 7 and specification of error No. 7, and is confined to No. 456 which covers the claim for refund of the processing tax paid on Jute.

The Jute claim (Jute R. 14-26) contains no margin evidence *but contrary to the statement of petitioner does contain a complete statement of the evidence showing, not presumptively, but absolutely, that respondent bore the burden of the tax.* (Jute R. 21-26). The *reason* no margin evidence is contained in the claim is set forth in the claim (R. 21) and that is that articles manufactured from the Jute fabric *were not sold* but used by claimant itself as containers for sugar. Therefore no "sales value", which is based on a claimant's sales price current, a necessary component of the margin computation (Sec. 907 (b)(6)), existed. Article 605 of Treasury Regulations 96 (Pet. pp. 37, 38) purporting to require the submission "with and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax" is applicable only where margin figures existed—not in a case such as this where no such figures ever existed or could exist.

Furthermore, the Commissioner did not reject the claim in this case for the lack of margin evidence (See rejection letter, Jute R. 27-28). In *Landrum* v. *Commissioner, supra,* the type of rejection letter issued in such a case is set forth (p. 858):

> "On May 23, 1940, the Commissioner, in a letter disallowing petitioners' claim for refund stated: 'Your claim does not contain margins computed in accordance with section 907 of the Act [7 U. S. C. A. § 649] and Article 605 of Regulations 96 issued pursuant thereto, nor has any other evidence been submitted establishing that you bore the burden of the tax as required by section 902 of the Act [7 U. S. C. A. § 644]

and Article 606 of Regulations 96. You have not filed a true and complete claim in accordance with the regulations prescribed by the Commissioner as required by section 903 of the Act [7 U. S. C. A. § 645] and Article 202 of Regulations 96. Therefore, as your claim does not comply with the provisions of Title VII of the Revenue Act of 1936 and Regulations 96 issued pursuant thereto, such claim for refund is hereby disallowed in full."

Also the Commissioner did not make any point as to the sufficiency of the claim a ground of his motion to dismiss in The Tax Court (See motion Jute, R. 29-30), but urged it for the first time in his brief before the Circuit Court of Appeals (Pet. p. 25). Petitioner says:

> "* * * However, the Circuit Court of Appeals failed specifically to pass upon this contention, perhaps leaving it to the Tax Court on remand."

It will be seen that there has been no final decision by any court below of the point raised. This Court will not take original jurisdiction nor for the first time pass upon the evidence in such matters.

CONCLUSION.

The petition for writs of certiorari in these cases is without merit and should therefore be denied.

Respectfully submitted,

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December 1947.

APPENDIX.

California's Agricultural Code.

Chapter 4

Nonprofit Cooperative Marketing Associations

1191. As used in this chapter:

(a) "Products" includes horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) "Member" includes members of associations without capital stock and holders of common stock in associations organized with shares of stock.

(c) "Association" means any corporation organized under this chapter.

1192. Associations organized hereunder shall be deemed "nonprofit," inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

1193. Five or more persons, a majority of whom are residents of this State, engaged in the production of products, may form a nonprofit cooperative association, with or without shares of stock, under the provisions of this chapter.

1194. Each association incorporated under this chapter may:

(a) Engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring, or use by its members of supplies,

machinery or equipment, or in the financing of any such activities; or in any one or more of the activities specified in this section.

(b) Borrow without limitation as to amount of corporate indebtedness or liability and may make advances to members.

(c) Act as the agent or representative of any member or members in any of the above-mentioned activities.

(d) Purchase or otherwise acquire, hold, own, and exercise all rights of ownership in, sell, transfer, pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing or packing or manufacturing or processing or preparing for market of any of the products handled by the association.

(e) Establish reserves and invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) Buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) Levy assessments in the manner and in the amount as may be provided in its by-laws.

(h) Do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and contract accordingly; and in addition exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and, in addition, any other rights, powers and

privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this chapter; and do any such thing anywhere.

(i) Use or employ any of its facilities for any purpose; provided, the proceeds arising from such use and employment shall go to reduce the cost of operation for its members; and provided, further, that the products of nonmembers shall not be dealt in to an amount greater in value than such as are handled by it for its members.

1195. (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, only such persons as are engaged in the production of products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

1196. The articles of incorporation of any such association shall state:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The county where the principal office for the transaction of business of the corporation is to be located.

(d) The number of directors thereof, which shall not be less than three, and the names and addresses of the persons who are to serve as first directors; if it be desired that the

first directors shall serve for terms of different length, the term for which each person so named shall serve.

(e) If organized without shares of stock, whether the voting power and the property rights and interest of each member are equal or unequal; and if unequal, the general rule or rules applicable to all members by which the voting power and the property rights and interests, respectively, of each member may be and are determined and fixed.

(f) If organized with shares of stock, the number of shares which may be issued and if the shares are to have a par value, the par value of each share, and the aggregate par value of all shares; if the shares are to be without par value it shall be so stated.

If the shares are to be classified, a description of the classes of shares and a statement of the number of shares of each kind or class and the nature and extent of the preferences, rights, privileges and rescriptions granted to or imposed upon the holders of the respective classes of stock; and except as to the matters and things so stated no distinction shall exist between said classes of stock or the holders thereof. One class of stock shall always be known as common stock and voting power may be restricted to holders of common stock.

(Amended by Ch. 474, Stats. 1943.)

1197. If an association organized hereunder issues nonpar value stock the issuance of such stock shall be governed by the terms of all general laws covering the issuance of nonpar value stock in domestic corporations.

1198. Articles of incorporation must be signed, acknowledged and filed in the manner prescribed by the general laws of this State for domestic corporations.

1199. The articles of incorporation of any association may be altered or amended in the manner and for the purposes prescribed in Section 362 of the Civil Code and by the general corporation laws of this State covering domestic corporations.

1200. Each association shall within 30 days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with this chapter. A majority vote of the members or shares of stock issued and outstanding and entitled to vote, or the written assent of a majority of the members or of stockholders representing a majority of all the shares of stock issued and outstanding and entitled to vote, is necessary to adopt such by-laws and is effectual to repeal or amend any by-laws, or to adopt additional by-laws. The power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote, or similar written assent, be delegated to the board of directors, which authority may, by a similar vote, or similar written assent, be revoked. Each association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meetings. Meetings of members or stockholders shall be held at the place as provided in the by-laws; and if no provision be made, then in the city where the principal place of business is located at a place designated by the board of directors. Meetings of the board of directors may be held at any place within or without the State fixed by a quorum thereof unless otherwise provided in the articles of incorporation or by-laws.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail or both, and the conditions, manner, form and effects of such votes; the right of members or stockholders to cumulate their votes and the prohibition, if desired, of cumulative voting.

(d) The number of directors constituting a quorum.

(e) The number of directors and the qualifications, compensation and duties and terms of office of directors and officers and the time of their election. Subject to the provisions of the general corporation law, the number of di-

rectors may be changed by a by-law duly adopted by the shareholders or members.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually, or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stockholder for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The amount of any dividends which may be declared on the stock or membership capital, which dividends shall not exceed eight (8) per cent per annum and which dividends shall be in the nature of interest and shall not affect the nonprofit character of any association organized hereunder.

(j) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or upon the expulsion of a member or forfeiture of his membership,

or at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors; and the conditions and terms for the repurchase by the corporation from its stockholders of their stock upon their disqualification as stockholders. In case of the expulsion of a member, and where the by-laws do not provide any procedure or penalty, the board of directors shall equitably and conclusively appraise his property interest in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion.
(Amended by Ch. 474, Stats. 1943.)

1201. The affairs of the association shall be managed by a board of not less than three directors, elected by the members or stockholders.
(Amended by Ch. 474, Stats. 1943.)

1202. The by-laws may provide that:

(a) The territory in which the association has members shall be divided into districts and that directors shall be elected from the several districts. In any such case, the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association.

(b) Primary elections shall be held to nominate directors. Where the by-laws provide that the territory in which the association has members shall be divided into districts, the by-laws may also provide that the results of the primary elections in the various districts shall be final and must be ratified at the annual meeting of the association.

(c) The territory in which the association has members shall be divided into districts, and that the directors shall be elected by representatives or advisers, who themselves have been elected by the members or stockholders from the several territorial districts. In any such case, the by-laws shall specify the number of representatives or advisers to be elected by each district, the manner and method of re-

apportioning the representatives or advisers and of redistricting the territory covered by the association.

(d) One or more directors may be nominated by any public official or commission or by the other directors selected by the members. Such director shall represent primarily the interest of the general public in such associations. The directors so nominated shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

(e) The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

(Amended by Ch. 474, Stats. 1943.)

1203. An association may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee.

1204. When a vacancy on the board of directors occurs other than by expiration of term the remaining members of the board by a majority vote shall fill the vacancy provided that when the by-laws provide for an election of directors by districts, the vacancy shall be filled by the election of a director from the district in which the vacancy occurs; or the board of directors may call a special meeting of the members or stockholders in that district to fill the vacancy.

1205. The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite both functions and titles in one person. The treasurer may be a bank or any depository and as such, shall not be considered as an officer, but as a function of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, except-

ing that the funds shall be deposited only as and where authorized by the board of directors.

1206. When a member of an association established without shares of stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue a certificate for stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

An association, in its by-laws, may limit the amount of common stock which one member may own.

The by-laws shall prohibit the transfer of the common stock or membership certificates of the associations to persons not engaged in the production of the products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one year thereafter.

No member or stockholder shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory note given in payment thereof.

1207. Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The di-

rector or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by 20 per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office.

1208. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 15 years, all or any specified part of their products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding 8 per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding 8 per cent per annum upon common stock.

1209. The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of

any provision of the marketing contract regarding the sale or delivery or withholding of products; and many further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

1210. In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

1211. In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for nondelivery or breach shall lie and be enforceable against such landowner, landlord or lessor.

1212. Whenever an association, organized hereunder with preferred shares of stock, shall purchase the stock or any property, or any interest in any property of any person, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest

purchased shall be equivalent to payment in cash for the shares of stock issued.

1213. Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for.

Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

1214. No person, firm, corporation or association, hereafter organized or doing business in this State, shall be entitled to use the word "cooperative" as part of its corporate name or other business name or title for producers' cooperative marketing activities, unless it has complied with the provisions of this chapter.

1215. An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing manufacturing, marketing or selling of the products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

Any two or more corporations organized hereunder may be merged into one such constituent corporation or consolidated into a new corporation, such merger or consolidation to be made in the manner prescribed by the general laws of the State covering domestic corporations.

1216. Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative or other corporation, association or associations, formed in this or in any other State, for the cooperative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective business.

1217. Any corporation or association organized under previously existing statutes for the purpose of cooperatively marketing products as defined in this chapter shall be deemed organized and existing under and by virtue of the terms of this chapter, and all of the provisions of the terms of this chapter, and any of the restrictions and benefits thereof shall apply in all of their terms to such corporation. The repeal of any acts under which such corporation or association has been incorporated shall not dissolve such corporation or association, but such corporation or association shall continue in existence as if organized under the provisions of this chapter.

1217.5. Any corporation organized or existing pursuant to provisions other than those of Title 23 of Part 4 of Division 1 of the Civil Code, may be brought under the provisions of this chapter by amending its articles of incorporation in the manner prescribed by the General Corporation Laws to conform to the provisions of this chapter, and whenever any corporation shall have amended its articles of incorporation to conform to the provisions of this chap-

ter, it shall be deemed to be then organized and existing under and entitled to the benefit of and subject to the provisions of this chapter for all purposes and as fully as though originally organized hereunder. Articles of incorporation shall be deemed to conform to the provisions of this chapter within the meaning of the foregoing whenever (a) it is provided or declared therein, in substance, regardless of form, that the corporation is organized and exists as a nonprofit cooperative corporation for the purposes provided for in or permitted by the provisions of this chapter, or one or more of said purposes; or (b) it clearly appears therefrom that the corporation desires to be subject to, and to be organized, exist and function under and pursuant to the provisions of this chapter. Whenever amended articles conform, as aforesaid, provisions therein that appeared in the original articles or some previous amended articles, shall be deemed ineffective if and to the extent the same are inapplicable to or inconsistent with the provisions of this chapter.

The provisions of this section shall be construed and applied as retrospective as well as prospective, and may be availed of by a corporation regardless of time of incorporation, whether prior or subsequent to the adoption of this section, and shall apply to amendments to articles of incorporation whether made prior or subsequent to the adoption of this section, and all amendments made prior to the adoption of this section shall be effective and valid to the same extent as though made subsequent to the adoption of this section.

(Added by Ch. 193, Stats. 1933.)

1218. Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this chapter shall be considered not to be illegal nor in

restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

1219. The general corporation laws of this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this chapter.

1219.5. The board of directors of every association organized hereunder shall cause to be sent to the members thereof not later than one hundred twenty (120) days after the close of the fiscal or calendar year an annual report of the operations of the association, unless such report be expressly dispensed with in the by-laws. Such annual report shall include a balance sheet as of such closing date. Such financial statement shall be prepared from the books and shall be in accordance therewith and shall be prepared in a form sanctioned by sound accounting practice for the association or approved by a duly certified public accountant. (Added by Ch. 304, Stats. 1935.)

1220. No corporation organized or existing under or by virtue of the terms and provisions of this chapter shall be subject in any manner to the terms of the corporate securities act of the State as approved May 18, 1917, or as amended, and any and all corporations organized under and by virtue of the terms of this chapter may and shall issue their membership certificates or stock or other securities as provided herein without the necessity of any permit from the commissioner of corporations.

1221. A contract entered into by a member or stockholder of a nonprofit cooperative association or corporation, providing for the delivery to such association or corporation of products produced or acquired by the member or stockholder, may be specifically enforced by the association or corporation to secure the delivery to it of such products, any provisions contained in the Civil Code to the contrary notwithstanding.